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June 20, 2017

Theodore Lipscomb, Sr.
Milwaukee County Courthouse
901 N. 9th Street, Room 201
Milwaukee, Wisconsin, 53233

Re: Implementation of County Board Resolution 17-452

Dear Chairman Lipscomb:

As you requested, this letter addresses two questions related to the implementation of County Board Resolution 17-452. The first relates to the impact, if any, of actions initiated to reclassify those unclassified employees whose positions, pursuant to the resolution, must be returned to their previously authorized pay grades.

The second question addresses how the unclassified employees in positions affected by the amendments to Milwaukee County Code of General Ordinances (MCO) §§ 17.05 and 17.11 may be identified.

1. Impact of alleged reclassifications on pay grade reallocation actions required by Resolution 17-452

As you know, the final decision and order issued by the Circuit Court in *Milwaukee County Board of Supervisors v. Abele*, Case No. 16-CVV-2888, upheld the statutory authority of the County Board to provide, fix, or change the compensation of county employees and expressly upheld the Board's authority to adopt the pay ranges for certain department heads in the 2014 county budget. Subsequently, Resolution 17-452 directed the Director of Human Resources and the Comptroller to take certain actions to restore unclassified employees to pay grades authorized by the Board and to eliminate all unauthorized pay grades, as follows:

BE IT FURTHER RESOLVED, that the Director of Human Resources and the Comptroller shall take all necessary actions to implement the pay grades authorized by the Board in the 2014 Budget, as adjusted for budgeted cost of living increases; and

BE IT FURTHER RESOLVED, that the Director of Human Resources and the Comptroller **shall eliminate all pay grades or pay ranges not currently authorized by the County Board, as hereto attached to this file in Exhibit 1;** and

BE IT FURTHER RESOLVED, that the Director of Human Resources and the Comptroller shall **take any positions, impacted by this elimination of pay ranges or grades, and assign them to their previously authorized pay grades,** with a pay assignment, for any employee currently occupying those impacted positions, to be within the minimum and maximum limits of the authorized pay grades, and to the step at or above their current pay.

BE IT FURTHER RESOLVED, that the Human Resources Director shall not direct the unauthorized amounts paid to the unclassified employees as compensation in excess of that authorized by County Board policies be deducted from subsequent pay or from money otherwise due to the affected employees; and

BE IT FURTHER RESOLVED, that the Human Resources Director shall submit to the Committee on Finance and Audit, and the Committee on Personnel, a written report showing the salary and pay grade of all unclassified employees, in compliance with County Board policies, no later than June 5, 2017

(emphasis added).

At the Personnel Committee meeting held at 9:00 a.m. on June 9, 2017, the Committee received the report from the Director of Human Resources pursuant to Resolution 17-452. The Committee also heard testimony from the Director of Total Rewards in the Department of Human Resources.

The report submitted by the Director of Human Resources, dated June 5, 2017, included a table listing 189 unclassified positions by title, with columns for the "Last Board Created Grade," "Assigned Grade," and "Status" for each title. The status listed for each was either "completed" or "pending."

For 32 titles in the table, the status was designated as "completed." In 19 of these "completed" titles, the "last Board created grade" and "assigned grade" do not match. For example, for the title "Exec Dir Admin Services," the "Last Board Created Grade"

column indicates a pay grade of 903E and the "Assigned Grade" column shows a pay grade of 904E. For the remaining 13 "completed" titles, no grade is listed in the "last Board created grade" column.

Of the 157 titles listed with a status of "pending," 14 titles show a "Last Board Created Grade" and "Assigned Grade" that do not match. For the remaining 143 titles listed as "pending," the "Last Board Created Grade" and "Assigned Grade" match.

Thus, it is apparent that the Director of Human Resources is not complying with the directive in Resolution 17-452 to "assign the positions to their previously authorized pay grades," but is assigning the positions to other existing pay grades.

On June 8, 2017, Milwaukee County Comptroller Scott Manske provided a memo addressed to Chairman Lipscomb, the County Board of Supervisors, and County Executive Abele with a subject line "Processing of Payroll based on Court Decision and County Board Actions." The memorandum stated that it was intended as "guidelines to assist my Payroll Division in processing payroll changes that result from the implementation of File #17-452 related to County employee compensation and the decision in 16-CV-2888, *Lipscomb v. Abele*."

The memorandum directs that "Reclassifications processed by Human Resources prior to the June 6, 2017 date of publication for the ordinance change in File # 17-452 will be recognized." The memo states that the Comptroller's Office will request written verification from Human Resources that such reclassifications have been "processed pursuant to their policies and procedures, and that the reclassifications are proper based on those policies and procedures and County ordinance." It further states that "any reclassifications or reallocations processed by Human Resources on or after June 6, 2017 will be subject to the procedures set forth in the new ordinance."¹

The Comptroller's directive that reclassifications or reallocations processed by Human Resources prior to June 6, 2017, shall be recognized is inconsistent with the County Board's direction in Resolution 17-452. The resolution required the Director of

¹ As discussed below, the amended reclassification ordinance prohibits reclassifications of positions that are unclassified pursuant to Wis. Stat. §§ 63.03(2)(t), (2)(y), and (3)(a). These include "administrative secretaries to county executive and county board" (§ 63.03(2)(t)); the parks director, director of the county department of human services, director of human resources, and county highway commissioner, i.e., "any position of general manager under s. 27.03 (2), director under s. 46.21 (1m)(a), department director under s. 59.52 (1), director of personnel under s. 63.02 (2) or county highway commissioner under s. 83.01 (1)" (§63.03(2)(y)); and any "department head, deputy department head, associate department head or immediate assistant department head...in pay range 30 or above" that has been transferred to the unclassified service by the Personnel Commission (§63.03(3)(a)).

Human Resources and the Comptroller to abolish “all pay grades or pay ranges not currently authorized by the County Board, as hereto attached to this file in Exhibit 1,” and to “take any positions, impacted by this elimination of pay ranges or grades, and assign them to their previously authorized pay grades.”

Exhibit 1, as referenced in Resolution 17-452, was a report dated May 23, 2017 from the Office of the Comptroller listing “the employees that are currently in ‘pay ranges’ that were not authorized by the County Board.” Resolution 17-452 in effect required that the positions identified in Exhibit 1 as being assigned to “pay grades or pay ranges not currently authorized by the County Board” to be reallocated to “their previously authorized pay grades.”

To the extent that the Administration attempted to move the positions listed in Exhibit 1 to a new classification with a different authorized pay grade between May 23, 2017 and June 6, 2017, these “reclassifications” were superseded by the Board of Supervisor’s action directing the Director of Human Resources and the Comptroller to “assign them to their *previously authorized* pay grades,” i.e., to the authorized pay grade to which the employees were assigned prior to the Administration assigning them to pay grades or pay ranges not authorized by the County Board.

Further, even if the resolution had exempted positions that were reclassified to another existing pay grade before the resolution took effect, that exception would not apply because no reclassifications of the positions listed in Exhibit 1 were timely finalized and implemented. MCO § 17.05 requires that:

Monthly while a reclassification is pending, the director of human resources shall provide a report to the committee on personnel which lists all position reclassifications which the director intends to approve, along with a fiscal note for each. This report shall be distributed to all county supervisors and placed on the committee agenda for informational purposes. If a county supervisor objects to the decision of the director within seven (7) working days of receiving this report the reclassification shall be held in abeyance until resolved by the county board, upon recommendation of the committee, and subsequent county executive action. If no county supervisor objects, the reclassification shall be implemented the first day of the first pay period following the meeting of the committee and in compliance with collective bargaining agreements.

MCO § 17.05(7). Although the Court’s decision in *Lipscomb v. Abele* provides that the Board does not have statutory authority to “refuse[] to accept employee reclassifications” pursuant to MCO § 17.05(7), the Court did not invalidate the other

procedural requirements of MCO § 17.05(7), including the requirement that the Director of Human Resources report reclassifications to the Personnel Committee and that reclassifications shall be implemented the first day of the first pay period following the meeting of the Personnel Committee. Such procedural requirements fall within the Board's broad policy-making function authorized by statute.

The Personnel Committee received no report of pending reclassifications of the unclassified employees listed in Exhibit 1. Furthermore, to the extent that the Director of Human Resources commenced actions for such reclassifications, they were not implemented by June 6. Thus, the reclassifications were at most pending when the Board's resolution directing the reallocation of such positions to the "previously authorized" pay grades *or* the amendment of MCO § 17.05, which prohibits the reclassification of all but a handful of such employees, took effect.²

The Comptroller's guidance that reclassifications before June 6, 2017, should be recognized was incorrect for either of the above reasons. Reclassifications commenced by the Director of Human Resources in an attempt to evade the directive in Resolution 17-452 should be disregarded. The Comptroller should ensure that payroll staff return all unclassified employees who were moved to unauthorized pay ranges or grades by the Administration, as identified in Exhibit 1, be returned to their previously authorized pay grades.

2. Identifying unclassified employees covered by amended MCO §§ 17.05 and 17.11

Resolution 17-452 provides for amendments of MCO § 17.05, establishing the policy for reclassifications, and MCO § 17.11, relating to budgetary provision for salary advancement. As amended by Resolution 17.542, MCO § 17.05 now provides, in relevant part:

- (8) The procedures provided in this section shall not be used to provide a higher pay range for an employee whose position is in the unclassified service pursuant to Wis. Stat. §§ 63.03(2)(t), (2)(y), and (3)(a). Because most of these non-classified positions are single-incumbent classifications within departmental management groups, a reclassification of such an employee to a classification with a higher pay range is, in effect, a reallocation. As a matter of county policy, the movement of an employee

² Approximately six positions are in the Office of the District Attorney, which are unclassified pursuant to Wis. Stat. § 63.03(km) and (n). These positions are not excluded from reclassification under MCO § 17.05(8), as amended.

who is unclassified pursuant to Wis. Stat. §§ 63.03(2)(t), (2)(y), and (3)(a) must be processed as a reallocation pursuant to section 17.055.

MCO § 17.05(8). The amended ordinance thus excludes certain unclassified positions from eligibility for reclassification. MCO § 17.11, as amended by Resolution 17.542, now provides in relevant part:

- (3) Notwithstanding (1), funds appropriated in the annual budget shall not be used to fund a salary increase for an employee in the unclassified service pursuant to Wis. Stat. §§ 63.03(2)(t) or 63.03(3)(a), unless authorized by the county board. The director of human resources shall provide a report to the committee on personnel that lists proposed salary increases for employees in the unclassified service pursuant to Wis. Stat. §§ 63.03(2)(t), (3)(y), or 63.03(3)(a) along with a fiscal note for each. This report shall be distributed to all county supervisors and placed on the committee on personnel agenda for its recommendation to authorize the expenditure of funds for the salary increases of the unclassified employees for the remainder of the fiscal year. The decision of the county board on the committee's recommendation, subject to review by the county executive, shall be final.

MCO § 17.11(3). The amendment thus provides for increased budgetary oversight by the Board of Supervisors over salary increases for certain unclassified employees.

Wis. Stat. § 63.03 provides that in every county in which a civil service commission is appointed, which includes Milwaukee County, "all offices and positions in the public service in the county shall be divided into 2 classes, namely, the classified and the unclassified service." Offices positions in the unclassified service are specifically identified in Wis. Stat. § 63.03(2) and (3). All other positions are in the classified service.

Wis. Stat. § 63.03 (2) provides a lengthy list of unclassified officers and positions, including the following:

- (a) All officials elected by the people.
- (b) All members of boards and commissions.
- (d) Court reporters of circuit court.
- (f) Undersheriff.
- (g) Deputy register of deeds.
- (h) Chief deputy clerk of the circuit court.
- (i) Deputy county clerk.
- (j) Deputy county treasurer.

- (k) Deputy coroner.
- (km) All members of the staff of a district attorney's office in any county with a population of 500,000 or more, except employees engaged in clerical and stenographic work.
- (n) Investigators in the office of the district attorney, when authorized by the county board.
- (o) Students and interns in medical or professional specialties.
- (p) Residents in the medical specialties.
- (q) Members of the medical staffs of the various hospitals, sanatoriums, and other county institutions who are supplied by a medical school or medical societies without expense to or compensation from the county.
- (r) All staff performing services for the Milwaukee County enrollment services unit under s. 49.825 or for the child care provider services unit under s. 49.826.
- (s) County executive.
- (sg) Medical examiner in any county with a population of 500,000 or more.
- (sm) Corporation counsel in any county with a population of 500,000 or more.
- (t) Administrative secretaries to county executive and county board.
- (u) Persons between the ages of 14 and 19 who perform part-time services of 20 hours per week or less under a work-creation program devised by the county.
- (v) Persons 16 years of age or older who perform training or services, or both, under a work experience program developed by the county or developed under federal auspices or sponsorship. Persons qualifying under this paragraph shall not be eligible for benefits under ch. 108.
- (w) Sergeant at arms to the county board.
- (x) Employees engaged in the operation of a public transportation system.
- (y) Any position of general manager under s. 27.03 (2), director under s. 46.21 (1m) (a), department director under s. 59.52 (1), director of personnel under s. 63.02 (2) or county highway commissioner under s. 83.01 (1).
- (z) Circuit court commissioners under s. 757.68 (1) employed on a full-time basis.

Wis. Stat. § 63.3(2). In addition to these specifically enumerated officers and positions, Wis. Stat. § 63.03(3) provides that the county civil service may “[t]ransfer any position of department head, deputy department head, associate department head or immediate assistant department head from the classified service to the unclassified service if the position is in pay range 30 or above.”

You asked how the latter category of unclassified positions may be identified. First, the Civil Service Commission’s meeting agendas, minutes, and packets regularly document its actions transferring positions into the unclassified service (see, e.g., Agenda of May 18, 2017 meeting of the Milwaukee County Civil Service Commission). The Commission may maintain other records of such transfers to the unclassified service.

Inquiry may be made of the Civil Service Commission of its public records documenting positions transferred to the unclassified service.

Alternatively, the county positions that have been made unclassified by the Civil Service Commission may be identified by a process of elimination. Wis. Stat. § 63.03(2) enumerates the categories of positions that are unclassified pursuant to statute. Any position that is currently unclassified, but does not fall within one of the enumerated categories, can only be unclassified pursuant to Wis. Stat. § 63.03(3). It should therefore be possible to identify the positions unclassified pursuant to § 63.03(3) from a list of all unclassified positions by removing all those that fall within a statutorily enumerated category under § 63.03(2).

I hope that this letter satisfactorily resolves the questions regarding the implementation of the County Board's resolution. Please feel free to contact me with any further questions about the content of this letter or the implementation process.

This letter is protected by the attorney-client privilege, which is waived if you choose to share it with others outside of the Board of Supervisors.

Sincerely,

PINES BACH LLP



Susan M. Crawford

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